

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 037772-05

Emmanuel Tsitsilianos
Worcester Housing Authority
Massachusetts Nahro SIG

Employee
Employer
Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Harpin and Calliotte)

The case was heard by Administrative Judge Benoit.

APPEARANCES

Richard D. Surrette, Esq., for the employee at hearing
Gerard T. Donnelly, Esq., for the self-insurer at hearing
John M. Dealy, Esq., for the self-insurer on appeal

LEVINE, J. The employee appeals from a May 8, 2013 decision, (hereinafter, “Dec. II”), denying his claim for §34 or §34A incapacity benefits. We affirm the decision.

A prior decision by a different judge issued on December 27, 2007, (hereinafter, “Dec. I”), on the employee’s claim for benefits for a September 5, 2006 industrial injury.¹ In that decision, the judge found the employee suffered from bilateral trauma to the gastrocnemius muscles and a resulting depressive disorder. He adopted the opinion of the §11A orthopedic physician that the employee could not return to his regular career but could perform full-time sedentary light work. (Dec. I, 5-6.) The judge also adopted the opinion of psychiatrist Dr. Mark Cutler that the depressive disorder was causally related to the work injury; however, the judge rejected Dr. Cutler’s disability opinion because it was “based on non-credible pain factors and allegations of an inability to concentrate.” (*Id.* at 6.) The judge ordered payment of medical bills, including

¹ We take judicial notice of documents in the board file. *Rizzo v. M.B.T.A.*, 16 Mass. Workers’ Comp. Rep. 160, 161 n.3 (2002). The evidence in the earlier case closed on December 14, 2007. (Dec. I, 2.)

Emmanuel Tsitsilianos
Board No. 037772-05

for psychiatric treatment, but he found that there was no credible evidence of total disability. (*Id.* at 6-7.) Accordingly, he awarded § 35 benefits from January 19, 2006, and continuing. (*Id.* at 7.)

The reviewing board summarily affirmed the decision, Tsitsilianos's Case, 22 Mass. Workers' Comp. Rep. 364 (2008), and the Appeals Court affirmed pursuant to Rule 1:28. Tsitsilianos's Case, 74 Mass. App. Ct. 1118 (2009).²

The employee exhausted his §35 benefits and subsequently filed the present claim for total incapacity benefits. The claim was denied at conference. The employee appealed and was examined by an impartial medical examiner, psychiatrist Dr. Bruce Goderez, who also testified by deposition. The present judge determined that the medical issues were complex, (Dec. II, 4), and both parties submitted additional medical evidence addressing only the employee's physical injuries.³ The judge found that the employee failed to prove that his psychiatric condition had worsened since the close of the record in the earlier hearing and denied the claim. (Dec. II, 12.)

² The Appeals Court stated:

Tsitsilianos claims that the administrative law [sic] judge erred by substituting his own judgment for that of a medical expert and by not considering the opinion of the expert in determining the extent of disability. Specifically, he contends that the administrative law [sic] judge should have adopted in its entirety the opinion of Tsitsilianos's psychiatric expert regarding the extent of his disability.

We conclude that the administrative law [sic] judge acted within his discretion and authority in determining the extent of Tsitsilianos's disability. The administrative law [sic] judge's decision rests in large part on a credibility determination regarding Tsitsilianos's assessment of his pain and his ability to concentrate and remember. Credibility determinations are the sole province of the administrative law [sic] judge and will not be overturned unless arbitrary and capricious.

Tsitsilianos's Case, *supra*.

³ The judge spent considerable time addressing the etiology of the employee's leg pain. However, the employee conceded in his appeal that "any issue as to the mechanism of the employee's physical injury and complaints of pain is a red herring and is tantamount to mere dicta." (Employee br. 7.) Thus, we do not address that subject.

To prevail in a claim for total incapacity benefits following a hearing decision finding him partially incapacitated, the employee must demonstrate that his work-related condition worsened due to his industrial accident. Foley's Case, 358 Mass. 230, 232 (1970). Without evidence of an increase in causally related impairment, the employee does not meet his burden. Glowinkowski v. KLP Genlyte, 18 Mass. Workers' Comp. Rep. 203, 205 (2004).

On appeal, the employee does not contend that his physical condition worsened. Rather, he contends that his psychiatric condition has worsened and that the "central issue" was whether and to what extent he was psychologically disabled. (Employee br. 3.)

However, the sole psychiatric evidence does not support this argument. Although the §11A examiner, Dr. Goderez, found that the employee became severely depressed after the 2005 accident, nowhere in Dr. Goderez's reports or testimony does he opine that the employee's psychiatric condition worsened after December 14, 2007, the date of the close of evidence in the first case. While Dr. Goderez diagnoses a major depressive disorder, he dates that diagnosis to before December 14, 2007. For example, in his February 9, 2012 report, Dr. Goderez states that the employee's inability to earn a living contributed "to the severe depression he has been in the last five years or so." (Ex 1, p. 9 of February 9, 2012 report; emphasis added.) And Dr. Goderez states that the employee "has been seriously depressed since shortly after his accident." (Id. at p. 12; emphasis added.) Glowinkowski, supra (employee failed to demonstrate a worsening of his work-related medical condition). Cf. Adams v. Town of Wareham, 20 Mass. Workers' Comp. Rep. 207, 209 (2007)(doctor did not address change in the employee's condition). Furthermore, the judge was not persuaded that the employee's symptoms worsened. (Dec. II, 12-13.)

Accordingly, the decision is affirmed.

So ordered.

Emmanuel Tsitsilianos
Board No. 037772-05

Frederick E. Levine
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

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